IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639 and 641

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

CITY OF TAMPA, FLORIDA,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

SOUTHERN RAILWAY SYSTEM,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

REPLY MEMORANDUM TO THE MEMORANDUM FOR THE UNITED STATES

The sole argument which the Department of Justice makes in urging this Court to undertake a plenary review of the exhaustive Report of the Commission in this matter is, admittedly, directed only "to the adequacy of an agency's analysis of one of the public-interest factors that it must consider" in reaching its overall determination as to the consistency of a proposed merger with the public interest.

(U.S. Memo 8)[1] The sole issue which the Department now raises is whether the Commission's Report demonstrates that it made "a reasonable effort to determine the scope and magnitude of the merger's adverse competitive effect" or, putting it another way, whether that Report "clearly show[s] that it [the Commission] carefully considered the competitive dimension." (U.S. Memo 4)

It is somewhat hard to understand this objection because the majority of the Commission's lengthy Report deals—and in considerable detail—with the competitive factor. (See 320 I.C.C., at 127-35; 139; 149-53; 161-84; 186-90; 206-12) One must conclude that the Department of Justice's real attack is upon the particular resolution of the issues at which the Commission arrived after considering the various factors—a matter obviously, as the Department concedes, within the Commission's jurisdiction (U.S. Memo 4, 8)—and not upon the techniques of the Commission's analysis of the competitive factor; an analysis which was undertaken largely in terms specific to the transportation industry. The Department makes no attack on the Commission's findings on any ground that they are not based on substantial evidence.

The Department specifies three respects in which it alleges that the Commission's grasp of the competitive factor was deficient. We will respond to each in turn.

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[1] We will use abbreviations herein similar to those used in our Motion to Affirm. References such as "FEC," etc., with page numbers, are to the pages of the Jurisdictional Statement filed by the indicated appellant. References to "Ex. Rep. fol." are to the indicated folio page (not the printed page) in the Examiner's Report, nine copies of which we have filed with the Clerk. References to "Statement" are to the indicated written statements received in evidence before the Commission; references to "Ex." are to the indicated exhibits received in evidence before the Commission; references to "St." after exhibit references are to statements forming a part of the indicated exhibit. References to "U.S. Memo" are to the "Memorandum for the United States" filed in connection with these appeals.

First. The Department contends that the "Commission seemingly assumed that the only adverse effects of the merger would be felt in western and central Florida, where Atlantic and Seaboard are the only railroads." (U.S. Memo 5) The Department apparently contends that had the Commission realized that there would be a decrease in the number of major rail competitors, from three to two, throughout the Southeastern United States by reason of the merger, and had the Commission thought about this point, it might have viewed the merger in a different light.

The fact that the merger would reduce the major rail systems in the Southeast from three to two was not a private vision of the Antitrust Division, unshared by the Commission. The Commission, of course, fully realized that the merger would eliminate competition between the Seaboard and the Coast Line throughout the Southeastern region. In the section of the Commission's Report entitled "Competitive Effects of the Merger Upon the Public," the very first sentence is: "The proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a 6-State area." (320 I.C.C., at 163) The Commission's Report extensively discusses the competitive impact of the merger throughout the Southeast (320 I.C.C., at 149-52; 163-64; 166-67; 188-90; 207-12), as does the Examiner's Report, which the Commission adopted.[2] (Ex. Rep. fol. 33-36; 47-95; 120-21; 124-29; 131; 137-38; 148-53) The Department's attempt to deny that the Commission considered the fact that the competition between the Seaboard and the Coast Line would be eliminated throughout the area is completely belied by the Commission's Report.

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[2] For the Commission's adoption of the Examiner's Report, see our Motion to Affirm, App. B, p. 6a.

The Commission fully and carefully considered this fact. It then proceeded to analyze, with a specificity which compares quite favorably to that of the Department's Memorandum, the extent to which the Seaboard and the Coast Line, by reason of the nature of their routes, actually were competitive with each other, and the extent to which they were not. (320 I.C.C., at 164, 211-12) The Commission then considered together with the actual elimination of competition in the region, the remaining rail competition that would be in effect after the merger, the competition from other modes of transport, and the benefits in terms of a strengthened rail transportation system—benefits which will be felt on a region-wide basis. (320 I.C.C., at 166) These area-wide benefits for "rail patrons and the public generally" (320 I.C.C., at 161), included such factors as "increased efficiency of operations, more flexible and regular schedules, faster service" (320 I.C.C., at 159), lower rates, elimination of certain charges, more adequate car supply, and a host of others. (320 I.C.C., at 159-61) In the light of all these factors,[3] the Commission made an overall judgment as to whether the merger—conditioned so as to maintain balanced rail competition—would be consistent with the public interest. (320 I.C.C., at 188, 207-12)

The Department may have a quarrel with the weight which the Commission put on the relative importance of maintaining region-wide competition between the Seaboard and the Coast Line (320 I.C.C., at 166-67);[4] but that quar-

[3] Near the close of its 91-page Report, the Commission stated: "we have made a searching analysis of each and every substantial issue presented in this proceeding and have carefully weighed the potential advantages and disadvantages that may reasonably be expected to result from the merger." (320 I.C.C., at 206)

[4] The general remarks of the Commission as to the effects of intermodal competition on the level of competition necessary among the railroads themselves, together with the Commission's observa-

rel does not present an issue for the courts. What the Department is doing here, we submit, is confusing the Commission's failure to agree with its contention as to the weight to be given the factor of preservation of a third rail system in the region with a failure to recognize that factor altogether. The Commission recognized that factor; but, as its Report makes plain (320 I.C.C., at 210-12), it weighed the other factors against it, and chose, on balance, to prefer those other factors to it—though only after applying conditions designed to strengthen the position of the region's second rail system.[5] Such a choice gives rise to no issue which could warrant plenary review by this Court. See, *e.g.*, *Illinois Cent. R. Co.* v. *Norfolk & Western R. Co.*, Nov. 14, 1966, Nos. 15, 17 & 20, O.T. 1966, 35 U.S. Law Week 4008, 4010-11; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 482 (1942); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-87 (1934); *Virginian R. Co.* v. *United States*, 272 U.S. 658, 665-66 (1926).

Second. The Department next (U.S. Memo 6-7) complains of the detail and particularity in which the Commission analyzed the effects of intermodal competition within central and western Florida.

In this contention, the Department suggests (U.S. Memo 6) that it was only by reference to intermodal competition that the Commission justified the creation of an origina-

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tions as to the regulated nature of the rail industry, were of course relevant to its weighting of these factors. See 320 I.C.C., at 166-67, 210.

[5] Indeed, the whole body of the conditions imposed by the Commission on the merger so effectively resolved the adverse competitive factors that many rail carriers which had intervened in the proceedings before the Commission terminated their opposition after the conditions were prescribed.

tion-point rail monopoly within central and western Florida. But this is not the case. The Commission affirmatively dealt with the special situation in central and western Florida. Recognizing that the real nature of competition in the rail industry is not origination-point competition but route competition for the long haul, the Commission made all of central and western Florida open, for the first time, to Southern's freight solicitation, by imposing Condition 8 on the merger.[6] It is not, as the Department suggests, simply "the availability of service by trucks or barges" (not to mention ships and mixed truck-water or rail-water moves) which upon the merger will shield the Florida shippers from "the injurious effects of a rail monopoly" (U.S. Memo 7),[7] but the fact that if those shippers are not happy with the services of the Merged Carrier, they will be able to make the Merged Carrier short-haul itself by specifying carriage by Southern on the beyond-Jacksonville segment of their rail movements.

Central to the Department's call for more analysis on the degree of intermodal competition in central and west-

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[6] As the Examiner's Report, adopted by the Commission, observed:

> "The arguments presented by Justice ignore many facts of life in the railroad industry. Generally, the important revenue producing traffic is that which generates long hauls . . . . On such traffic, the through movement is handled successively by many railroads, and the competition which exists is between available routes rather than between the railroads concerned. Often, railroads which do not serve the same areas beyond common gateway points are in position to, and actually do compete with each other. . . . More often than not, the primary aspect of competition having bearing on the movement of important long-haul traffic involves the question of which railroad is able to convince the persons responsible for the routing of the most desirable traffic, to designate the specific routes most favorable to the soliciting railroad." (Ex. Rep. fol. 153)

[7] The overwhelming majority of the Florida shippers in fact supported the merger. (320 I.C.C., at 160-62; 165; Ex. Rep. fol. 41-45, 124)

ern Florida is what it describes as its "belief" that "a more probing inquiry by the Commission would have revealed that the railroads continue to enjoy substantial monopoly power in the long-haul transportation of many important commodities produced in the affected area. . . . " (U.S. Memo 6)—With all due respect to the Department's "beliefs" on the subject, they are contradicted by the evidence of record. The Commission did not, as the Department charges, "*presume* the efficacy of intermodal competition" (U.S. Memo 7; emphasis original); its findings as to its efficacy (320 I.C.C., at 149-54, 166, 210-11) were based on substantial evidence. That evidence, as to the area in question[8] included, among other things, documentation to the effect: that of the concrete aggregates, sand and gravel shipped by Florida's largest shipper of these commodities, 30% moved by truck[9] (Statement X, pp. 3-4); that at a large fertilizer company with four locations in the territory served by the Seaboard and the Coast Line (Tr. 1994), two-thirds of the inbound raw materials come in by water, including all of the phosphate rock arriving from the Florida mines[10] (Tr. 1999); that the same company ships 29% of its outgoing fertilizer from its Florida plant by truck (Tr. 1999); that a very large packing plant, accounting for 10% of Florida's canned citrus crop and 5% of the frozen citrus crop, used trucks to ship 46% and used

[8] Special studies as to the central and western Florida intermodal competition situation were presented to the Commission in rebuttal. See Statement BW; Ex. H-252. A portion of the general material on intermodal competition also relates to this area.

[9] Prior to 1947, none of these commodities moved by truck. (Statement X, pp. 4-5)

[10] The Florida rail carriers do not even appear generally to get the short haul on this movement from the mines to the port of Tampa. This shipper has provided, or has had provided for it, extensive facilities for the movement of phosphate rock from the mines to the port by truck, and for its transshipment from truck to water at Tampa. (Tr. 2003)

water carriage to ship 5% of its production (Statement AA, pp. 2-3); that even as to shipments *in excess of 100 miles,* trucks carry 18.8% of the fertilizer and fertilizer products, 30% of the building products, and 92.1% of the papermill products (Statement C, p. 32; Ex. H-36, St. U);[11] that at a number of major Florida points, trucks carried 65% or more of the combined rail and truck traffic (Statement C, pp. 30-31; Ex. H-36, St. T); that there was between 1956 and 1958 a 267% increase in the movement of superphosphate from Florida to Gulf and Mississippi River points by barge, necessitating drastic reductions in rail rates by the railroads in an effort to compete (Statement C, p. 35); that despite general freight rate increases during the five years from 1956 to 1960, there was a downward movement in the freight revenue per ton on a number of the bulk-loading commodities shipped to and from Tampa, including commodities such as sand and gravel, stone and rock, cement, phosphate rock, and superphosphate (Statement BW, p. 2; Ex. H-252, St. A, sheets 1 and 3, St. G, sheet 5); that because of truck competition, the freight rates on sulfur moving in the central and western Florida area had been driven down, with revenue per ton mile dropping from 2.7 cents to less than one cent (Statement BW, pp. 14, 17-18; Ex. H-252, St. G, sheet 2); that rail traffic originating in the Tampa area *not* involving a water movement (*i.e.,* that on which the railroads kept the long haul), actually declined between 1956 and 1960 both in absolute terms and in terms of revenue per ton (Statement BW, p. 4; Ex. H-252, St. A, sheet 3); that while the amount of tonnage of phosphate in the area moving at least part way by rail increased by 18.3% in

[11] These particular statistics were based on a survey of twenty-one points in the applicants' territory, ten of which were in Florida. (Statement C, pp. 24-25) The other statistics we relate at this point are specifically pointed at Florida.

the period from 1956 to 1960, the gross rail revenues increased by only 5.5% (Statement BW, p. 12; Ex. H-268; Ex. H-252, St. F); that rail revenues per ton on inbound trans-shipped movements ex-water at Tampa declined from $1.35 to $1.18 in the five years before the application, indicating the competitive pressures even on the short haul (Statement BW, p. 4; Ex. H-252, St. A, sheet 4); and that, in general, the revenue yield on the heavy bulk-loading commodities in central and western Florida was under a considerable squeeze from competition from other modes of transport—truck, barge, and ship movements and mixed movements with rail getting the short haul or no haul at all—during the years before the filing of the merger application (Statement BW, pp. 13-15; Ex. H-249; Ex. 250; Ex. 251; Ex. H-252, St. G, sheet 1; Ex. 259; Ex. 260; Ex. 261; Ex. 262)—All of this indicates a strange sort of "monopoly power" (U.S. Memo 6) on the railroads' part.

Thus, the record reflects the massive intermodal competition—even on low-rated, bulk-loading commodities which are in the popular mind[12] thought of as the exclusive property of the railroads—which has increasingly affected the railroads with respect to central and western Florida in recent years. There is no hard core of traffic any longer assured to the railroads. (Statement BW, pp. 19-20) Accordingly, despite the Department's assertion, the Commission did not "presume" that the railroads were under pressure from intermodal competition in central and western Florida. (U.S. Memo 7) It *found* that they were.

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[12] The Justice Department's Memorandum apparently reflects this erroneous preconception. Perhaps had the Department been more than sporadic in its attendance at the Commission hearings, it would have become better apprised of the "facts of life in the railroad industry." See our Motion to Affirm, p. 16 n. 10; for the quotation, see Ex. Rep. fol. 153.

(320 I.C.C., at 153; see also Ex. Rep. fol. 38) As even the brief review of the highlights which we have just made suggests, that finding was made on the most substantial of evidence, as were the Commission's more general findings that the overall level of intermodal transport competition necessitated strengthening the rail carriers through merger. (320 I.C.C., at 166-67; 210; 211-12)

Third. The Department also complains (U.S. Memo 7) that the Commission should have made findings in further detail as to the rail monopoly to be created by the merger in central and western Florida. It is hard to see the purpose of further findings on this subject. The Commission in fact found that there would be a rail monopoly (in terms of origination-point service) created by the merger in the Tampa area and generally in central and western Florida. (320 I.C.C., at 164-65) No one seriously disputed this or could dispute it. Why the Commission should have, in order further to elucidate a subject as to which there was no dispute, proceeded to make detailed findings as to the names of all the cities and towns from which rail shipments move in the area and as to the names of the different products originating in each one (U.S. Memo 7) is mysterious.[18]

The Commission, instead, proceeded to remedy this practical problem not by spinning out a census of shippers or otherwise multiplying details but by a practical solution: the imposition of the Jacksonville gateway condi-

[18] In similar vein is the Department's complaint that the Commission "did not attempt to determine how many shippers would be denied competitive rail service." (U.S. Memo 7) Since the Commission recognized that there would be a rail monopoly created in the entire central and western Florida area, thereby ending such origination-point rail competition as existed within the area, the suggestion that it should have run an exact count on the number of shippers involved appears to contemplate essentially a make-work project.

tion (Condition 8), which would provide *all* rail shippers in this area—regardless of the commodities involved or the specific origination points of the shipments—access to competing rail service for the long haul; namely, service by the Southern for the segment "beyond" Jacksonville.[14] (320 I.C.C., at 180-84) We cannot appreciate why the Department believes that it would have been preferable for the Commission to have proliferated findings as to the extent of the origination-point rail monopoly which would admittedly be created by the merger within central and western Florida, rather than devise, as it did, a practical solution to the monopoly problem which would permit the overall benefits of the merger to the southeastern United States to be realized while providing balanced competition for the long haul on rail movements commencing or terminating within the Florida problem area.[15] This, again, is simply another instance of the fundamental mistake which the Department and the appellants make of confusing judicial proceedings under a prohibitory statute, like Section 7 of the Clayton Act, with administrative proceedings under Section 5 of the Interstate Commerce Act, where the agency has the power of developing through its adminis-

[14] Thus the merger, as the Commission suggested (320 I.C.C., at 188) would make many Florida shippers better off than before, in terms of rail competition. For Seaboard and Coast Line compete at relatively few origination points in the area; and with the Jacksonville gateway closed, a shipper in a town served only by one of them would be restricted to the services of the carrier who happened to serve his town. (320 I.C.C., at 182)

[15] Condition 12 imposed on the merger (see our Motion to Affirm, p. 7 n. 5, pp. 33-34), which requires the Merged Carrier to grant the Central of Georgia (a Southern subsidiary) trackage rights between Albany and Tifton, Georgia, also helps provide a practical solution to the Florida situation by improving the alternative routes available to Florida shippers in the beyond-Jacksonville "long haul" movement. This matter is, as the Commission pointed out, "closely related to the opening of the Jacksonville gateway." (320 I.C.C., at 183)

trative tools a practical solution to the competitive "danger zones" in a proposal brought before it.[18]

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The Department in general expresses concern that in passing on the merger, the Commission, with respect to the competitive factor, did not act "with its eyes open." (U.S. Memo 8) But we submit that any impartial review of the Commission's Report would lead to the same conclusion as the District Court reached: That "the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits." (FEC 38a)

The Commission's careful Report is itself the best evidence of its concern for the danger zones in terms of the competitive factor. Perhaps the best illustration of this would be to put in context the Commission's observation, quoted out of context by the Department, that "such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities." (U.S. Memo 8, quoting from 320 I.C.C., at 167)—A full reading of this page of the Commission's Report makes it clear that the Commission is here referring to the merger *only in the light of the protective conditions which it imposed.* The Commission's basic judgment of the competitive factor and the other public interest factors involved in the merger is expressed elsewhere on that page:

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[18] Besides the Commission's discussion of the conditions which it actually imposed, it also considered other aspects of the practical problems which the merger would create in Florida, and discussed the practicalities of solving them. See 320 I.C.C., at 152-53; 172-75 (effect on FEC); 186-87 (consideration of Southern's "track transfer" proposal); 208-10. The Examiner's Report also discusses the practicalities of the situation in Florida. (Ex. Rep. fol. 34-35; 48-73; 77-79; 120-21; 126-27)

> "Absent suitable protective conditions and consideration of these factors [the countervailing public-interest factors], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws. Here, however, it is clear that the benefits of this merger, *when viewed in the light of the conditions hereinafter imposed,* will greatly outweigh the potential injuries and hence the policy underlying the antitrust laws does not represent a barrier to its approval." (320 I.C.C., at 167; emphasis supplied)

It is then perfectly plain that the Commission, in conditionally approving the merger, acted "with its eyes open" to the competitive and other public-interest factors.[17]

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[17] On November 23, 1966, the Tampa Port Authority filed a "Brief Amicus Curiae" in this Court supporting the position of appellants. This was the first appearance of Tampa Port Authority in the 2½ year course of these judicial review proceedings. The sole argument of Tampa is the argument, not made by any of the parties to the case, that certain findings of the Commission are not supported by substantial evidence on the record viewed as a whole. In support of its allegations, Tampa Port Authority makes no analysis of the record before the Commission but simply alleges, on the basis of unsupported assertions as to matters of fact outside the record, that the conclusions of the Commission's Report are in error. We see no purpose to be served by making reply to such a document. The "Brief Amicus Curiae" on its face demonstrates that the real concern of Tampa Port Authority is with certain other proceedings pending before the Commission, in which Coast Line and Seaboard as individual carriers are parties, and which proceedings have no relation whatsoever with the merger. To the extent that Tampa Port Authority has any valid grievance with respect to the Commission's handling of those other cases, it can, of course, seek judicial review when final orders of the Commission are rendered in them.

CONCLUSION

We submit that the nature of the few specifics which the Department's Memorandum raises is itself a clear indication of the absence of any basis for further review of the Commission's resolution of the public-interest factors involved in the proposed merger. Accordingly, for the reasons stated in our Motion to Affirm and herein, the judgment should be affirmed.

Respectfully submitted,

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